Supreme Court, U. S.
FILED
MAR 23 1978
MICHAEL RODAK, JR., CLERK

No. 77-870

In the

Supreme Court of the United States

OCTOBER TERM, 1977

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

CITY OF PALESTINE, TEXAS, ANDERSON COUNTY, TEXAS, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

HOWARD J. TRIENENS
MARTIN M. LUCENTE
JAMES S. WHITEHEAD
One First National Plaza
Chicago, Illinois 60603
Counsel for Petitioner

MARK M. HENNELLY
210 North 13th Street
St. Louis, Missouri 63103

WILLIAM R. McDOWELL
WILLIAM A. BRASHER
505 North Industrial Boulevard
Dallas, Texas 75207

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
Of Counsel

March 21, 1978

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-870

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

CITY OF PALESTINE, TEXAS, ANDERSON COUNTY, TEXAS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

The brief in opposition essentially acknowledges that that holding of the court below was erroneous by seeking to uphold the judgment below solely on grounds not reached by the court of appeals. The court of appeals held that the Interstate Commerce Commission was powerless in a railroad consolidation proceeding under Section 5 of the Interstate Commerce Act (49 U.S.C. §5) to nullify restraints arising from state law even when those restraints frustrate the economies and efficiencies to be realized from the consolidation, impose an undue bur-

den on interstate commerce, and are contrary to the public interest. The court interpreted Section 5(11) as limiting the Commission's nullification powers to those instances where the restraints would prevent the effectuation of the technical merger, where state law restraints "[stand] in the way of the approved transaction." (App. 14).[1] Thus, the court below failed to recognize that Section 5(11) is merely a description of the scope of the immunity conferred by law as a result of a Commission order and that the only limitations on the Commission's nullification power are found in Section 5(2)(b), which requires that the terms and conditions imposed by the Commission be "just and reasonable" and that the merger as approved "will be consistent with the public interest." (App. 2).

MoPac demonstrated in its Petition that the court of appeals' reading of Section 5 is wholly inconsistent with decisions of this Court, other courts of appeals, and the Commission, and that the interpretation of the Commission's powers reached by the court below, if allowed to stand, would severely frustrate the oft-expressed Congressional intent to foster the development of efficient and economical rail systems through consolidations and mergers. The limitation imposed on the Commission by the court below cannot stand in view of this Court's interpretation of the Commission's authority expressed in *Texas* v. *United States*, 292 U.S. 522 (1934); *Seaboard Air Line R.R. Co.* v. *Daniel*, 333 U.S. 118 (1948); and *Schwabacher* v. *United States*, 334 U.S. 182 (1948).[2]

[1] "App." refers to the Appendix to the Petition for Writ of Certiorari filed by the Missouri Pacific Railroad Company (MoPac).

[2] Respondents rely heavily on the dissenting opinion in *Schwabacher*. (Brief in Opposition, pp. 19-20).

The Brief in Opposition filed by Respondents City of Palestine, Texas, and Anderson County, Texas, does not attempt to defend the sole ground upon which the court below rested its decision.[3] In what amounts to a confession of error, Respondents seek to uphold the result reached below on contentions the resolution of which the court below explicitly stated were "unnecessary for our decision" (App. 11), and which the opinion below did "not resolve" (App. 12). By relying on arguments not reached below, Respondents essentially acknowledge that the decision below cannot be defended as a proper interpretation of the Interstate Commerce Act.

Instead, Respondents argue first that the Palestine Agreement is a purely private contract with a third party not involved in the proposed consolidation and that the Commission does not have the power to nullify restraints of this nature. Respondents made the same contentions in the court below, where they were hotly contested by Petitioner.[4] In view of its holding, which Respondents do

[3] Respondents note the actual holding below only in passing (Brief in Opposition, p. 18), but make no effort to defend it in light of the Petition.

[4] 'Respondents' attempt to characterize the agreement as purely private ignores the fact, noted by the court below (App. 7-8), that the agreement bound the predecessor to MoPac only as a result of Texas statutes, the nullification of which was approved by this Court in *Texas* v. *United States*, 292 U.S. 522 (1934). Although the provisions of the agreement have been modified over the years as a result of negotiations between the parties, there can be no doubt that the underlying requirement to retain employees and facilities in Palestine stems from the Texas statutes. See the Appendix to the Commission decision. (App. 38).

(Footnote continued)

not attempt to defend in this Court, the court below did not resolve these issues:

> "We need not resolve either of these questions because, assuming for the purpose of argument that the ICC has the power to abrogate this contract, we conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden MoPac, the agreement clearly is not an obstacle to the merger of T&P and C&EI and does not threaten the merger's success." (App. 12).

The court below thus assumed that "state restraints" were involved and held that the ICC's power was limited to setting aside only those restraints that were "not an obstacle to the merger" transaction as such. The failure of Respondents to support the only holding made by the court below, the clear error in the interpretation of the Commission's authority upon which the Court below rested its decision, and the significance of the decision in

---

[4] (Continued)

Moreover, the power of the Commission to abrogate private contracts when necessary in the public interest has been established by this Court in *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U.S. 467, 482 (1911), and *New York* v. *United States*, 257 U.S. 591, 600-601 (1922). Indeed, in *Texas and New Orleans R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151, 161 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), cited by Respondents (Brief in Opposition, p. 34), the Fifth Circuit acknowledged that:

> "Under certain circumstances, when carriers have been faced with contract demands which would be contrary to the public interest in the effectuation of a Section 5(2) transaction, the courts have held that the carrier may be relieved of those demands by the Commission."

view of recent and continued Congressional enactments designed to encourage rail economy and efficiency through consolidation, all establish the need for review by this Court. The judgment below, based exclusively on an erroneous interpretation of the Interstate Commerce Act, should be vacated and the cause remanded to the court of appeals for that court to address, in the first instance, the question not reached, namely whether the Palestine Agreement is a "restraint, limitation, [or] prohibition of law," within the meaning of Section 5(11). *See United States* v. *Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 515 (1976); *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 548 (1972); *Federal Power Commission* v. *United Gas Pipe Line Co.*, 386 U.S. 237, 247 (1967); *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562, 578 (1952).

Respondents' second attempt to sustain the decision of the court below is to argue that the nullification of the Palestine Agreement was not in the public interest and that the Commission's decision should have been set aside on this basis as well. Thus, Respondents cite MoPac's earnings,[5] the adverse impact on MoPac employees located

---

[5] The earnings and dividend figures quoted by Respondents are meaningless, of course, without knowing what rate of return on investment they represent. For 1976, MoPac's earnings represented a rate of return on capital invested in the railroad of only 4.93%. At a time when yields on U.S. Government bonds exceed 8%, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) with the purpose of improving railroad earnings in order to preserve the railroads as private enterprises able to attract investment capital without government subsidies. (4-R Act, §§101(a), 205, 45 U.S.C. §801(a), 49 U.S.C. §15a(4)).

at Palestine,[6] and the effects of the removal of a number of these employees on the Palestine economy.

Each of these concerns was thoroughly presented at the hearing before the administrative law judge and was considered by him and the full Commission. Notwithstanding these matters, the Commission, with only a single dissent, found that the restraining effect of the Palestine Agreement on the realization of the economies and efficiencies of the merger and the burden on the unified operations and interstate commerce was so substantial that the nullification of the agreement was required in the public interest. Indeed, the court below acknowledged that the agreement constituted a restriction on the efficient operation of the consolidated system:

> "No doubt the merged MoPac system would operate more efficiently and free of 'burdens on interstate commerce' without the strictures of the Palestine Agreement." (App. 14).

In their public interest contention as well Respondents are seeking to support the result reached below on a ground not relied upon by the court of appeals because of its erroneous interpretation of the Commission's statutory authority. As explained above, Petitioner submits that the appropriate procedure is to grant review, vacate the judgment below as resting on a clearly erroneous interpretation of the Interstate Commerce Act, and remand the case to the court of appeals for consideration of the questions upon which Respondents rely in this Court but which were not resolved by the Court below.

[6] As Respondents' recognize in their Brief in Opposition, p. 32, the interests of affected employees are sufficiently protected by Section 5(2) (f) of the Act, which requires a carrier to ensure that its employees will not be placed in a worse position as a result of a merger.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

HOWARD J. TRIENENS
MARTIN M. LUCENTE
JAMES S. WHITEHEAD
One First National Plaza
Chicago, Illinois 60603
Counsel for Petitioner

MARK M. HENNELLY
210 North 13th Street
St. Louis, Missouri 63103

WILLIAM A. McDOWELL
WILLIAM A. BRASHER
505 North Industrial Boulevard
Dallas, Texas 75207

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
Of Counsel

March 21, 1978